IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

FLOYD G. AFFOLDER,
Petitioner,
v.
NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a Corporation,
Respondent.
} No. 200.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

Respondent begins its "Suggestions and Brief in Opposition to the Granting of the Writ" by making a so-called "corrected statement of the case." We shall not advert thereto further than to say that we perceive nothing therein that adds anything essential to the determination of the question whether the Court of Appeals erred in holding that the charge of the District Court was prejudicially erroneous.

II.

(1)

Respondent in its "Suggestions and Brief," under the heading "Jurisdiction of This Court" (p. 3), argues that the case is not of sufficient importance to warrant interference by this Court. Such contention is refuted by a long line of decisions of this Court. This Court has time and again made it plain that it will review on certiorari cases arising under the Safety Appliance Acts or the Employers' Liability Act, whether in the Federal or State Courts, in order to prevent a railroad worker from being deprived of rights vouchsafed to him by the statute. Among such decisions are: Delk v. St. L. & S. F. R. Co., 220 U. S. 580, 55 L. Ed. 590; Myers v. Reading Co., 331 U. S. 477, 91 L. Ed. 1615; Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916; Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 354, 87 L. Ed. 1444; Blair v. Baltimore & Ohio R. Co., 323 U. S. 600, 607, 89 L. Ed. 490; Ellis v. Union Pacific R. Co., 329 U. S. 649, 91 L. Ed. 572; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 88 L. Ed. 520; Pauly v. McCarthy et al., Trustees, 330 U. S. 802, 91 L. Ed. 1261; Penn v. Chicago and Northwestern Ry. Co., 333 U. S. 866, 92 L. Ed. 1144. And, as pointed out in our petition for the writ, this opinion of the Court of Appeals, if permitted to stand, is bound to result in the utmost confusion in the matter of charging the jury in the trial of any case involving a similar fact situation.

(2)

Under this same heading, respondent, on page 4 of its "Suggestions and Brief," says that "the opinion of the Court of Appeals herein discloses that the parties were in complete agreement on the fundamental law governing the trial of this action." The Court of Appeals, in its opinion,

did not state that the parties were in agreement as to the fundamental law of the case, and what it did say in that connection was unwarranted. The Court of Appeals said:

> "The parties are in agreement that the failure of the Pennsylvania and Rock Island cars to couple on impact was sufficient evidence from which the jury could, if it saw fit, properly infer that defendant had violated the Safety Appliance Act in not equipping its cars with 'couplers coupling automatically.'"

Petitioner is not bound by this dictum. For the reasons shown in our original brief, the failure of the Pennsylvania car to couple to the Rock Island car automatically on impact, when the knuckle on the Pennsylvania car had been properly prepared for coupling, constituted more than mere circumstantial evidence warranting an inference that respondent had failed to equip its cars with couplers coupling automatically on impact; it constituted direct proof that respondent was then and there using on its line a car not equipped with couplers coupling automatically by impact. This has been petitioner's position throughout this entire litigation.

III.

On pages 5 to 12, inclusive, of respondent's "Suggestions and Brief" appears a discussion under the heading, "Reasons Relied on for Disallowance of the Writ." Rule 38 of this Court (Paragraph 3) as amended requires the respondent in a certiorari proceeding to file a brief conforming to Rules 26 and 27. Neither Rule 26 nor Rule 27 affords any sanction for the filing by respondent, in addition to its brief, of "reasons relied on for the disallowance of the writ"; and it follows that the matter appearing therein need not be noticed.

IV.

(1)

Respondent's contention in the first subdivision of its Argument (p. 13), that the District Court's charge to the jury was prejudicially erroneous because of alleged inconsistencies therein is utterly refuted by the fact that—as held by the Court of Appeals—**the charge made clear to the jury that defendant's liability depended upon its failure to equip its car or cars with couplers coupling automatically by impact.**

(2)

The second subdivision of respondent's argument (pp. 13, 14) likewise calls for scant notice. Our original brief contains nothing justifying the respondent's statement (p. 14) that petitioner "implies" that, since Tielker's testimony was not directly contradicted, it must be taken as true; and consequently respondent's argument based on that premise is quite beside the mark.

(3)

The third subdivision of respondent's argument (pp. 15-20) is devoted to an effort to defend the ruling of the Court of Appeals in condemning the District Court's charge on the ground that it contained no explanation of the legal effect of the proof that the cars failed to couple automatically by impact, "and the permissible use which the jury could make of it, i. e., that from it the jury could infer bad condition of the couplers and consequent violation of defendant's statutory duty" (R. 211), which ruling, we submit, is indefensible. In its discussion of the matter respondent wholly fails to reckon with the fact this case is not one in which proof of a violation of the statute can be found only by inference. This is a case in which the evidence showed the failure of cars to couple

automatically by impact when the couplers had been placed in proper position for coupling; which evidence constituted direct proof that the railroad company was then and there hauling on its line a car or cars not equipped with couplers coupling automatically by impact. And upon such proof **it matters not how the couplers may have functioned either before or after the occasion in question. Myers v. Reading Co.**, 331 U. S. 477, 483; **Spotts v. Baltimore & Ohio R. Co.** (7 Cir.), 102 F. (2) 160, 162; **Atchison, Topeka & Santa Fe R. Co. v. Keddy**, 28 F. (2) 952, 955.

There are many cases in the books involving an alleged violation of the Safety Appliance Acts where there was no direct proof of such violation but where this might legitimately be inferred from the evidence adduced. Respondent in its brief (pp. 16 to 18) relies upon language appearing in the course of the opinions in three such cases, namely: Myers v. Reading Co., 331 U. S. 477, 482, 484; Vigor v. Chesapeake & Ohio Ry. Co., 101 F. (2) 865; and Chicago, M. St. P. & P. R. R. Co. v. Linnehan, 66 F. (2) 373, 378, 379.

In the Myers Case (331 U. S. 477) the ultimate issue of fact was whether the defendant carrier had violated the Safety Appliance Acts in failing to have its railroad car equipped with an efficient hand brake. There was no proof of any defect in the hand brake in question, but the plaintiff's testimony was that while he was attempting to tighten the brake it kicked back, causing him to fall from the car. It was in that connection that this Court said that the railroad company could be found liable if the jury reasonably might infer that the brake was defective and inefficient. This affords no authority in support of the ruling of the Court of Appeals in this case that the evidence here adduced did no more than warrant an inference that the automatic coupler provision of the statute

was violated, and that, ergo, the trial court erred in not explaining in its charge the supposed inferential effect of such evidence. In view of the evidence in this case showing that the couplers failed to couple automatically by impact on a fair trial, constituting direct proof that the respondent was then and there hauling on its line a car not coupling automatically by impact, there was no occasion for the trial court to make any reference in its charge to inferences or to make any explanation of the legal effect of the evidence other than that appearing in the charge.

The Vigor Case (101 F. [2] 865), was not a case where the proof showed the failure of couplers to couple automatically by impact on a fair trial. In that case the defendant's train was proceeding at a speed of about fifteen or twenty miles an hour when the tender of the engine became separated from the first car, causing the brakes on all the cars to be set and the train to come to a sudden and violent stop, whereby the employee sustained fatal injuries. The Court of Appeals held that proof that cars became uncoupled while in use was evidence from which the jury was entitled to infer that the coupler was not in condition to perform the function required of it by the statute. The language quoted by respondent from the opinion has no application to a case such as this.

In the Linnehan Case (66 F. [2] 373), the plaintiff was unable to effect an opening of the knuckle of the coupler by use of the pin lifter and went between the cars and undertook to open the knuckle by hand. The language quoted from the opinion by respondent in its brief (pp. 17, 18) was used in connection with that situation; a situation unlike that involved in the instant case. Respondent's quotation from the opinion is here inconsequential.

Respondent, on page 18 of its brief, from Sweeney v. Erving, 228 U. S. 233, 244. The Sweeney Case has long

been a landmark in the law relating to the res ipsa loquitur rule. But the language quoted by respondent from the opinion therein can have no application to an action for the violation of the automatic coupler provision of the Safety Appliance Acts where there is direct proof of the failure of couplers to properly function so as to effect a coupling automatically by impact.

Respondent, on page 19 of its brief, also quotes from the opinion in the Tennant Case (321 U. S. 29). There no violation of the Safety Appliance Acts was involved. The action was one under the Federal Employers' Liability Act for the death of Tennant, a brakeman, charged to have been caused by the negligence of the engineer in starting up his engine at night in the yards without the ringing of the bell as the rules required. The engineer admitted he did not ring the bell. There was no direct proof that the failure to ring the bell was the proximate cause of Tennant's death, but, as the Court held, there was evidence from which this could be legitimately inferred. The language quoted by Respondent from the opinion related to that issue. It is here far afield.

V.

CONCLUSION.

It will be observed that the Court of Appeals in condemning the charge on the ground that it contained no explanation of the legal effect of the proof that the couplers, though prepared for coupling, failed to couple automatically by impact, and the "permissible use" which the jury could make of such proof (R. 211), failed to cite a single authority in support of such ruling; and that not a single case is cited in respondent's brief constituting a semblance of authority for the theory that in a case involving

an alleged violation of the automatic coupler provision of the Safety Appliance Acts, where there is direct proof of the failure of couplers to couple automatically by impact on a fair trial, proximately resulting in injury to an employee, the trial court may not lawfully submit the ultimate issue in the language of the statute, but that its charge must, indeed, contain an "explanation" such as that suggested by the Court of Appeals in this case.

It is not surprising that the learning and industry of counsel have not produced any authority in support of that theory, for, we submit, it is utterly unsound, out of accord with many decisions of this Court and in conflict with the decisions of other courts of appeals as shown by our petition for the writ and brief in support thereof.

Petitioner again prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Court of Appeals for the Eighth Circuit in this case be reversed and that of the District Court affirmed.

Respectfully submitted,

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